

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 141

Docket No. DE-0752-09-0439-I-1

**Brian Ellis,
Appellant,**

v.

**Department of Defense,
Agency.**

July 16, 2010

Brian Ellis, Queen Creek, Arizona, pro se.

Rachael K. House, Esquire, Carson, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed his removal. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still AFFIRMING the appellant's removal.

BACKGROUND

¶2 The appellant was employed by the agency as a Quality Assurance Specialist (Electronics), GS-11. Initial Appeal File (IAF), Tab 4, Subtab 4a. By letter dated May 19, 2009, the agency proposed the appellant's removal based on charges of (1) willfully forging or falsifying official government records or documents, (2) misuse of position, and (3) failure to accurately report information on the Office of Government Ethics (OGE) Form 450. *Id.*, Subtab 4e. Under the falsification charge, the agency alleged that the appellant created two documents, including one produced on agency letterhead with an agency computer, falsely stating that he had been recalled to active military duty and would be relocating from Arizona to Florida. *Id.* at 2. The agency further alleged that the appellant sent those documents to a property management company in an attempt to vacate his rental property before the end of the lease term. *Id.* Under the misuse of position charge, the agency alleged that the appellant violated [5 C.F.R. § 2635.702](#) by misusing official government stationery and modifying his orders from the Department of the Air Force. *Id.* at 3. Under the final charge, the agency alleged that the appellant failed to disclose income from outside employment. *Id.* at 3-4.

¶3 In his written response to the notice of proposed removal, the appellant admitted that he had provided false information to the management company in an attempt to terminate his lease. IAF, Tab 4, Subtab 4d at 1-2. However, he denied that he had received any financial gain from his actions. *Id.* He also argued that his inappropriate use of government property (including letterhead) was not related to the performance of his job duties. *Id.* at 2-3. He denied that he misused his position in violation of [5 C.F.R. § 2635.702](#). *Id.* at 3-4. With respect to the OGE Form 450, the appellant stated that he would have reported his outside income had he been aware that he was required to do so. *Id.* at 5-6.

¶4 On June 24, 2009, the agency issued a letter of decision removing the appellant effective June 26, 2009. IAF, Tab 4, Subtab 4b. The deciding official

sustained the falsification and misuse of position charges, but he did not sustain the charge relating to the OGE Form 450. *Id.* at 1.

¶5 The appellant filed a timely Board appeal challenging his removal. IAF, Tab 1. He initially requested a hearing, *id.* at 2, but he subsequently withdrew that request, IAF, Tab 6. The administrative judge therefore issued a decision on the written record. IAF, Tab 9. She found that the agency had proven both of the charges sustained by the deciding official. *Id.* at 4-6. She further found that a nexus between the appellant's conduct and the efficiency of the service was obvious from the nature of the conduct. *Id.* at 7. Finally, she found that the agency had considered the relevant *Douglas* factors and that the penalty of removal was within the tolerable limits of reasonableness. *Id.* at 7-10. She therefore affirmed the removal. *Id.* at 10.

¶6 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. He argues that the penalty of removal was too severe. *Id.* at 3. The agency has responded in opposition to the petition for review. PFR File, Tab 4.

ANALYSIS

¶7 On petition for review, the appellant has not challenged the administrative judge's findings with respect to the charges, and we will not disturb them. *See* [5 C.F.R. § 1201.114\(b\)](#) ("The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review."). However, we reopen the appeal to address the issues of nexus and penalty.

¶8 In addition to the requirement that the agency prove its charge against the appellant, the agency must also prove that there is a nexus, i.e., a clear and direct relationship between the articulated grounds for the adverse action and either the appellant's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Canada v. Department of Homeland Security*, [113 M.S.P.R. 509](#), ¶ 10 (2010); *Merritt v. Department of Justice*, [6 M.S.P.R. 585](#), 596 (1981),

modified by *Kruger v. Department of Justice*, [32 M.S.P.R. 71](#), 75 n.2 (1987). The administrative judge found an “obvious” nexus in this case, reasoning that the agency has a “clear interest” in its employees not misusing their positions to forge government documents. IAF, Tab 9 at 7. We deem it appropriate to address this issue in more detail.

¶9 An agency may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances, (2) preponderant evidence that the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance, or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Kruger*, 32 M.S.P.R. at 74. We need not determine whether the appellant's conduct is sufficiently egregious to create a rebuttable presumption of nexus because the agency has presented evidence of the specific impact of the misconduct. The deciding official, Albert Godinez, stated in his declaration that the appellant performed his duties with little oversight, and that the agency needed to have trust in his judgment and integrity. IAF, Tab 8 at 3. He also explained that the appellant's position sometimes presented opportunities for an employee to put his own interests above those of the government, and he indicated that the appellant's actions in this case demonstrated a willingness to put his interests first. *Id.* at 6. He stated that he had lost confidence in the appellant's integrity and judgment. *Id.* at 7. The deciding official's declaration establishes that the appellant's conduct affected management's trust and confidence in his job performance. Therefore, under the particular circumstances of this case, nexus is established.

¶10 With respect to penalty, the appellant argues that he was not a “repeat offender,” that he was an above average employee, that he accepted responsibility for his conduct, that he was not trying to gain financially, that his offense was not committed in the completion of his job duties, that he was not treated the same as

similarly situated employees^{*}, and that there was no notoriety or publicity surrounding his actions. PFR File, Tab 1 at 3. He also argues that the deciding official failed to consider the effect of personal issues on the appellant's conduct. *Id.* The agency responds that removal was appropriate, particularly in light of the intentional and serious nature of the appellant's misconduct and the deciding official's loss of confidence in the appellant's integrity and judgment. PFR File, Tab 4 at 10.

¶11 Where, as here, all of the agency's charges are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Singletary v. Department of the Air Force*, [94 M.S.P.R. 553](#), ¶ 9 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Singletary*, 94 M.S.P.R. 553, ¶ 9; *see Douglas*, 5 M.S.P.R. at 306. The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Singletary*, 94 M.S.P.R. 553, ¶ 9. The declaration of the deciding official establishes that he considered the relevant factors in determining the penalty. IAF, Tab 8 at 6-7. We find that removal is

* When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Lewis v. Department of Veterans Affairs*, 111 M.S.P.R. 388, ¶ 8 (2009). Here, however, the appellant has not identified any similarly situated employees, and we therefore find that he has failed to establish disparate penalties. *See Vargas v. U.S. Postal Service*, 83 M.S.P.R. 695, ¶ 9 (1999) (a claim of disparate penalties is "an allegation . . . to be proven by the appellant").

within the tolerable limits of reasonableness for the sustained misconduct. The appellant's disagreement with the weight given to particular factors does not provide a basis for reversing the initial decision. The appellant engaged in serious and intentional misconduct that caused the agency to justifiably lose confidence in his integrity and judgment. We find that the deciding official reasonably determined that those factors outweigh any mitigating factors, including the appellant's length of service and any personal issues that may have contributed to his actions. *See Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 17 (2007) (in assessing the appropriateness of the agency's penalty selection, the most important factor is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated). The Board's role is not to displace the judgment of senior agency managers who must have confidence that employees will act appropriately at all times. *Id.*; *Batts v. Department of the Interior*, 102 M.S.P.R. 27, ¶ 11 (2006).

ORDER

¶12 Accordingly, we affirm the appellant's removal. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.